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Citation	Hong Kong Law Journal, 2011, v. 41 n. 2, p. 401-410
Issued Date	2011
URL	http://hdl.handle.net/10722/164157
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WHY ARE HONG KONG JUDGES KEEPING A DISTANCE FROM INTERNATIONAL LAW, AND WITH WHAT CONSEQUENCES? REFLECTIONS ON THE CFA DECISION IN *DRC v FG HEMISPHERE*

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In DRC v FG Hemisphere both the majority and minority opinions in the Court of Final Appeal treated international law as irrelevant for the decision which was supposed to be taken on the basis of constitutional principle alone. This was a mistaken course with potentially very negative consequences for the rule of law in Hong Kong. The minority treated decisions taken on sovereign immunity by HK courts in the past as frozen into precedents in common law and therefore deriving their strength only from the common law of Hong Kong. On the other hand the majority effectively decided that any issue coming before it which involves international law is automatically a matter of foreign affairs and that it is up to the PRC to tell the HK courts what is the interpretation of international law. The article argues that in future HK courts should treat the law of sovereign immunity as sui generis having no implications for their approach to other international law questions.

Introduction

The facts of the *DRC v FG Hemisphere*¹ are very well known. Here it is not necessary to reiterate them. The essential point is that the PRC is engaged in massive development cooperation with the DRC, through the instrumentality of its state owned enterprises (SOE) and banks, some of which have a seat in Hong Kong. FG Hemisphere wished to recover a previous bad debt of the DRC through entry fees that the PRC's SOEs in Hong Kong are due to pay the DRC. The PRC argues, through the Secretary of Justice as intervener, that it is its view of international law that sovereign immunity is absolute and that this rule should apply to HK Courts' exercise of jurisdiction. The PRC, especially in its 3rd letter to the Court, also argues that sovereign immunity and its transactions with the DRC are clearly matters of foreign affairs which fall outside the

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¹ [2011] 4 HKC 151.

competence of the HKSAR. It argues that in matters of foreign affairs, such as the state policy on sovereign immunity, it is essential that the HKSAR and the PRC speak with one voice.

These arguments appear to mingle together inextricably international law and domestic constitutional law questions. It is nowhere explicitly stated by the PRC in its letters, that it alone decides the content of international law that applies to the PRC. However, it could be argued that, in the view of the PRC, it is a particularity of this aspect of international law that each state applies it in its own courts as it judges its state policy to require. Then the question arises, what is the status of the international law doctrine of restrictive immunity as it has applied through the common law, in Hong Kong. It could be said that Hong Kong, before the handover, simply had applied to it the decisions which the United Kingdom applied, also as a matter of state policy, with respect to sovereign immunity in its national courts. The failure to keep on the UK Sovereign Immunity ordinance after 1997 might indicate the intention that PRC state policy was to be adopted in Hong Kong. This is a matter of interpretation of all aspects of the Basic Law, including the legal arrangements accompanying the Handover in June 1997.

International law is a general system of law which is equally binding on all states. In other words, it is not a matter of individual state legal policy how international law is understood. Particularly, customary international law binds all states, even those which have not expressly consented to it. Through persistent objection it might appear that an individual state may opt out of an evolving rule of customary international law. However, the possibility of persistent objection is disputed and, in any case, it is contested in this case, whether the PRC is effectively a persistent objector. As for the position of the United Kingdom it would be tendentious to say that the doctrine of restrictive sovereign immunity is its state policy. In other words, the common law of Hong Kong itself reflected at, and after the Handover, what was regarded as the international law doctrine of restrictive sovereign immunity. It would be better to say that the United Kingdom and its former colony, under the One Country, Two Systems rule, are observing the fairly recently evolved international customary law rule on restrictive sovereign immunity. I am aware that all of these points, as a matter of international law, can be a matter of debate and have been in the High Court and in the Court of Appeal in this case.

However, it is a remarkable fact that both the majority and the minority opinions in this case keep a firm distance from international law and purport to treat the entire legal issue of sovereign immunity as a matter of what the judges call “municipal law and constitutional principle”. The

case note explores how all of the judges do this. It speculates a little as to why they do so, but above all, it expresses concern about the consequent apparent abdication of international law issues by the HK Courts in favour of the PRC, ostensibly on the ground that it is a matter of foreign policy for the PRC to determine the content of international law. It is recommended that it would have been better for the rule of law in international society – a society of which Hong Kong in economic matters is a very significant part – for the majority to have determined that either the law of sovereign immunity was absolute under international law, the same view as that of the PRC, or that even under the doctrine of restrictive immunity, the relations of the PRC and its SOEs in the DRC had an entirely sovereign character, normally outside the jurisdiction of national courts. This would have preserved more clearly the competence of the HK courts to interpret effectively all of those rules of international law which touch upon the external aspects of the economic and social relations which normally come within its jurisdiction under the Basic Law. Instead, the Court of Final Appeal appears to have left a great deal of confusion around the relationship of international law and constitutional law in both the PRC and in the HKSAR, and very much to the disadvantage of international law.

The Side-Lining of International Law in all of the Judicial Opinions

The majority opinion claims (para 411) to reject the relevance of international law to the case, whether it requires the rule of absolute or restrictive immunity and whether the PRC could be an effective persistent objector. It goes on to say that it is not necessary to consider this question because “we have provisionally reached the conclusion that, as a matter of municipal law and constitutional principle, the doctrine of state immunity applicable in the HKSAR is one of absolute immunity”. This is a clear statement by the Court of Final Appeal that there is an absolute distance between international law and what it calls “municipal law and constitutional principle”.

The position of the dissenting Justice Bokhary is identical. When faced with arguments for and against the change in the rule of customary international law on state immunity from absolute to restrictive, he notes the agreement of Lord Pannick, for FG Hemisphere, at para 120, “...holding that the immunity available in the courts of Hong Kong is restrictive does not require a general pronouncement by the Court that restrictive immunity is a rule of customary international law...”. As Lord Pannick puts it, the common law has had its debate on this in Hong Kong

and the doctrine of restrictive immunity has won. So Justice Bohkary concludes in para 121 that it is not necessary for him to decide whether restrictive immunity is a rule of customary international law. "Nor is it necessary for me to decide whether persistent objection works". In other words, the case appears to have been predominantly argued and entirely decided in terms of what is supposed to be the constitutional position in Hong Kong and the PRC. The confrontation between the majority and the minority, including Justice Mortimer, could not be more severe. The minority argue that the HK constitutional settlement is one country – two systems, and that the common law is part of the two systems. The common law has a doctrine of restrictive immunity. The minority do not engage in a detailed investigation of the meaning of the doctrine of restrictive immunity, how it might work in practice at present in international society, and, especially, do not engage in a discussion of the merits of the doctrine in the particular facts of the case.

The True Doctrine of the Incorporation of Customary International Law into the Common Law

In our *Hong Kong Lawyer* article (March 2011)² Oliver Jones and I argue that the position of the Court of Appeal in this case, effectively now that of Lord Pannick and Justice Bohkary, is wrong. The task of English judges is to ascertain the current state of Customary International Law as forensically as possible, instead of trying to develop or advance Customary International Law, which is the role of the international community, including the Executive (*Jones v Ministry of Interior of Kingdom of Saudi Arabia* [2007] 1 AC 270 (*Jones*), 298; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 513). The same would surely be true of courts in Hong Kong.

In other words, it is not simply a matter of treating previous common law courts' decisions as freezing international law into binding precedents at a particular point in time. As we see it, the upshot is that no previous incorporation of Customary International Law is decisive. The Courts are not simply following the common law, but ascertaining the continuing development of principles of international law. The question should not be limited to: "what has the common law of Hong Kong previously incorporated as Customary International Law?" Instead, it must always be "what does Customary International Law currently pro-

² Tony Carty and Oliver Jones, "The Congo Case" *Hong Kong Lawyer*, Mar 2011 43–50, at 44–45.

vide”? It requires the courts to resist common law behaviours of applying precedent, but more importantly for the present constitutional conflict, it means that the Courts are not just applying the common law of Hong Kong at the time of the handover – which may or may not be, or have to be, compatible with the constitution of a unitary state. They are applying a universally accepted international law standard. We noted that Stock V-P, with whom Yuen JA agreed on this point, made a tentative finding that “the generality of States do subscribe to [restrictive immunity] (para 76)”, but the choice of both judges, and in this case also Justice Bohkary (para 123), to base their decision on the state of the common law as at the handover (para 118–122, 258–267), leaves them open to the constitutional law argument that a unitary state should follow a single national law on sovereign immunity. It would have been much more difficult for such a constitutional law argument to be made in the face of a determination by the Court of Appeal, and by the dissenting Justices Bohkary and Mortimer, that international law required the acceptance of the doctrine of restrictive immunity.

The Determination of the Content of a Rule of International Law is not an Act of State, but a Matter for Judicial Interpretation

The majority argues that Hong Kong and China have to speak with one voice in foreign affairs, that a sovereign immunity law is part of foreign affairs, and that since the PRC has a view of sovereign immunity as absolute this must be the law of Hong Kong as well. As noted, the majority decide the case solely as a matter of what it calls “municipal law and constitutional principle”. It gives no consideration at all to the idea of international law.

A closer examination of exactly what the majority opinion involves is necessary to understand how they see the relationship of international law on sovereign immunity to the Basic Law.

The first point is that they regard international law itself as automatically a matter of the foreign policy of a state. They state categorically at para 247:

“Accordingly, where constitutional responsibility for the conduct of foreign affairs is allotted to the executive, and where the courts accept a “one voice” principle, there is no reason to exclude that approach in relation to the executive’s policy regarding the recognition or non-recognition of a commercial exception to absolute state immunity”.

The majority repeat this idea many times. So, they say (para 265), that “it is plain that the conferring and withholding of state immunity is a

matter which concerns relations between states, forming an important part of the conduct of a nation's affairs in relations with other States". It is important to see that the majority are confronting what they see as a constitutional principle, whether the HKSAR can espouse a different state immunity doctrine (para 293). These are also the terms in which Justice Bohkary sees the matter. The two systems element of one country – two systems, applying to HKSAR-PRC relations, allows the HKSAR to continue to adhere to what he sees as the common law principle of restrictive immunity as its part of the two systems (para 123). This is opposed by the majority to the view expressed in the 3rd Letter from the OCMFA, identifying "the prejudice to the sovereignty of the Chinese State which would result if the HKSAR courts were to purport to promulgate a divergent state immunity doctrine" (para 294). These statements in the just mentioned letter are what the majority call "facts of state", quoting FA, Mann to mean "facts, circumstances and events which lie at the root of foreign affairs and their conduct by the Executive" (para 295).

The conclusion follows for the majority that the act whereby the CPG determines the policy of state immunity applicable to the HKSAR is an act of state coming within the concept of "acts of state such as defense and foreign affairs" in Art 19(3). This is because "It involves the CPG's determination of the PRC's policy in its dealings with foreign States with regard to state immunity" (para 352). The majority then proceed to treat the letters from the OCMFA, established under Art 13(2) of the Basic Law as having the status of declarations of facts of state, which the HKSAR courts "accept as authoritative statements of facts within the peculiar cognizance of the executive organ of the government having charge of a nation's foreign policy" (para 363). The questions of fact are the PRC's determination of the fact that the doctrine adopted by the PRC is a doctrine of absolute immunity and that "the adoption of a divergent position of the HKSAR courts would prejudice China's sovereignty and hamper its conduct of foreign affairs..." (para 361). As for asking for a certificate from the Chief Executive, there is no need for him "to be troubled even where the relevant facts have been authoritatively established and are not in dispute" (*ibid.*). Just to reiterate, the majority is referring to "the undisputed and authoritative facts of state declared in the OCMFA Letters, without need for a certificate" (para 363).

Jones and I argued again in our *Hong Kong Lawyer* article,³ that the Chief Executive of Hong Kong be asked merely to characterise the facts

³ *Ibid.*, 46–48.

of the DR Congo's and China's activities in the Congo as either commercial or sovereign under Art 19(3). By this we meant, not whether the original loans incurred by the DRC in the 1980s were commercial, or whether the use to which the DRC would put the entry fees given to it by Chinese companies was commercial, but whether all of the facts of the transactions taken together would impact on the foreign policy goals of the PRC if they were adjudicated in the HKSAR Courts. That appeared to us as a situation for which it could be the goal of the safety-catch of Art 19(3) to provide. On the facts, we argued, the activities are most likely sovereign in the sense that China is implicated at the highest level in these activities, in order to achieve a range of social and political as well as economic goals.

From the statements in para 5 of the OCMFA 3rd Letter, we know what the answer would be to such a request under Art 19(3). The letter says categorically that supporting the economic development of developing states is one of the foreign policies of China. Foreign companies acquiring developing country debts, at knockdown prices and then claiming the full original value through judicial proceedings, hampers efforts to assist these developing countries. "Such practice is inequitable... If the HKSAR... facilitate the pursuance of the above-mentioned practice, it would be contradictory to the above-mentioned foreign policy of China and tarnish the international image of China". The OCMFA letter is in this respect an entirely commendable judgment of fact. It treats the practices of FH Hemisphere as damaging to the welfare of the Congo, frustrating to the PRC's desire to help it develop and damaging to the reputation of the PRC, which would have a reputation for harbouring a "bad-debt" collecting centre in the shape of the HKSAR Courts.

The request, which we proposed, from the CFA to the Chief Executive, or simply, as the majority would prefer, taking para 5 of the 3rd Letter as being perfectly clear in its meaning, would be enough to terminate this case, to decide it conclusively. Our aim in the *Hong Kong Lawyer* article was to avoid what now appears to have happened. Reviewing the British practice we said that "...the Foreign Office was not entitled to bind English courts on matters of international law generally. Abstract views "on the law, even international law, were in no way conclusive".⁴ The CFI majority appear to be saying that a HKSAR Court must accept without question whatever the PRC says to be international law, on whatever matter, including the proposition that as a matter of international

⁴ *Ibid.*, at 47.

law the role of a persistent objector is accepted – in fact a thoroughly contested issue among international lawyers.

The majority opinion has gone much further than was necessary for a decision of the case and could expose the PRC on other occasions to legal argument in the HKSAR Courts for adopting an unusual interpretation of a rule of international law or for once again appearing as a persistent objector, opposing the development of a new customary rule of international law, when it might be receiving the support of most states. The controversy which exists at present about the nature and extent of state immunity in international customary law is not an unusual feature of international law. It is quite normal that different states have different interpretations of the nature and extent of rules of international law. It appears, on the face of it, that the majority opinion in this case is committing itself to the position that the PRC, through the OCMFA, may deliver an interpretation binding upon it, with respect to any and every rule of customary international law or even a multilateral treaty to which the HKSAR is party through the good offices of the PRC. It is true that, generally, the PRC does not favour compulsory or other third-party adjudication of disputes, although it does accept it in some cases, such as under the Statute of the World Trade Organization. However, for the CFA majority to treat the determination of the nature and extent of an international legal obligation as a declaration of a “fact of state underlying foreign policy” is to offer a huge hostage to fortune, which it was the hope of Jones and myself to avoid through a simpler and more focused determination in accordance with the spirit of the above-quoted parts of para 5 of the 3rd Letter.

Recourse to International Law rather than Constitutional Law to Avoid Constitutional Conflict and Resolve the Material Dispute Equitably

It appeared to Jones and myself obvious, after the decision of the Court of Appeal, that the *DRC v FH Hemisphere* case was building up into a constitutional confrontation along the lines of *The Common Law versus the Sovereignty of the PRC*. It was, arguably, a mistake on the part of both the majority and the Dissenting Opinions not to go directly to an interpretation of the international law as Jones and I do in the concluding part of the *Hong Kong Lawyer* article.⁵ It would have been open to the majority opinion to have itself expressed the sentiments that are in the

⁵ *Ibid.*, at 48–49.

3rd Letter, para 5. This would also have challenged Justices Bohkary and Mortimer to enter more closely into the merits of the particular case and revisit the decision of the majority in the Court of Appeal as to whether the transactions are sovereign or commercial. Instead, they put the main weight of their opinions onto a defense of the common law as an expression of the rule of law of which judges are the guardians.

The issue would not simply be whether the original debts incurred by the Congo Government in the 1980s were sovereign or commercial, but whether all the facts underlying the transactions now – between the DRC, the PRC and individual banks and companies – taken together are sovereign in the sense of impacting upon the foreign policy goals of the PRC. This use of Art 19(3) appears appropriate as a safety-valve.

The Role of Domestic Courts in Developing International Law

Of course there is also the general question of the role of domestic courts in developing international law. Most jurisdictions in the world are proud of the role which their domestic courts can play in this respect. They are thought to be contributing significantly to the development of the rule of law at an international level.⁶ Indeed, it is now sometimes the position in England, that the Courts will not defer to the Executive on the issue whether the Crown's conduct is compatible with the international rule of law. Take for example the fairly recent cases of appeal from the Special Immigration Appeals Commission to the Court of Appeal in England. Here, the Court of Appeal has been willing repeatedly to question the soundness of treaties made by the United Kingdom with foreign countries, in this case Memoranda of Understanding between the United Kingdom and Libya, which, despite the fact that they are treaties, do not ensure the UK's compliance with international law.⁷ The UK (Blair) Government's assertion that it was safe to return Libyan suspect terrorists to Libya was not accepted, whatever high policy of state might encourage the United Kingdom, at that time, to cultivate good relations with Colonel Gaddafi. The treaty assurances given by Libya to the United Kingdom and accepted by the United Kingdom were not sufficient for the Court of Appeal. Of course it is true that the Court of Appeal is able to rely upon the Human Rights Act 1998 incorporating the ECHR into UK law. Nevertheless, the immigration cases show that

⁶ See for instance, J Nijman and A Nollikaemper, *New Perspectives on the Divide between National and International Law*, Oxford, Oxford University Press, 2007.

⁷ <http://www.migrationwatchuk.org/briefingPaper/document/84>.

as a matter of legal policy it is not the case that common law judges must defer to the Executive simply because an issue before it concerns foreign relations. These foreign relations must now be judged in the light of the international rule of law, in these cases, international human rights law.

In future, to limit the damage of this case, the HK Courts should distinguish the law of sovereign immunity as a peculiar part of international law in allowing the courts to leave to the Executive the discretion to decide what comity requires in relations with other states, so that normally its courts of law remain the authoritative interpreters of international law. Comity is an issue separate from jurisdiction.⁸ This is a difficult and very much *ex post facto* argument to make. It might be possible to say that there is something especially sensitive about states using their own courts to sue one another as states. However, this should not be extended to claims of immunity of state officials in the courts of other states for acts which are contrary to international human rights, humanitarian or criminal law. As can be already seen from these speculations, damage limitation is not going to be easy.

⁸ I was stimulated to try to make this very much *ex post facto* distinction after perusing a draft case note by Cora Chan, *Congo v FG Hemisphere: Implications on Hong Kong's Judicial Autonomy*.